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No. 83-497

In the Supreme Court of the United States

October Term 1983

MICHAEL ALBERT KALY, Petitioner

-vs-

STATE OF MICHIGAN, Respondent

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI

Michigan Court of Appeals Nos.
58257 & 60173

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QUESTIONS PRESENTED

I

WERE PETITIONER'S DOUBLE JEOPARDY RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN PETITIONER WAS CONVICTED OF A VIOLATION OF MICHIGAN'S "FELONY FIREARM" LAW AND MANSLAUGHTER.

II

WERE PETITIONER'S DOUBLE JEOPARDY RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHERE PETITIONER WAS RE-TRIED AFTER THE TRIAL COURT GRANTED A POST CONVICTION MOTION FOR NEW TRIAL.

III

WAS PETITIONER DEPRIVED OF DUE PROCESS OR A FAIR TRIAL BASED ON THE INSTRUCTIONS GIVEN BY THE TRIAL COURT TO THE JURY WHICH DEALT WITH THE DEFENSES OF ACCIDENT AND SELF DEFENSE.

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JURISDICTION OF THE COURT

Petitioner is correct in asserting that the Michigan Court of Appeals decided petitioner's State appeal on 1 July 1982. Petitioner is also correct in asserting that the Michigan Supreme Court denied an Application For Leave To Appeal the Court of Appeals decision on 19 May 1983. Petitioner is also correct in asserting that an Application for Rehearing filed by petitioner in the State Supreme Court was denied by that Court on 15 August 1983.

Petitioner is incorrect however in asserting that the jurisdiction of this Honorable Court is properly invoked by 28 USC 1254. That section provides an appellate framework relating to an appeal or application for a Writ of Certiorari from a decision of a case in one of the Federal Court's of Appeals. A review of the statutory basis of jurisdiction cited by Petitioner reveals that that section does not create jurisdiction in this Honorable Court in this instant cause as Petitioner is seeking a writ from the Michigan Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The respondent accepts the Petitioner's citation of the involved Constitutional provisions.

STATEMENT OF THE CASE

The Respondent will accept Petitioner's Statement of the Case as being basically correct. The Respondent wishes to complete one aspect of the Statement however which is not fully presented by Petitioner.

Petitioner was originally tried on one count of Second Degree Murder (MCLA 750.317) and one count Possession of a Firearm During the Commission or Attempt to Commit a Felony (MCLA 750.227b). Petitioner was convicted of Manslaughter (MCLA 750.321) and Possession of a Firearm (MCLA 750.227b). A new trial motion was granted and petitioner was retried. He was again convicted of Manslaughter, but this time of Involuntary Manslaughter under a different manslaughter statute (MCLA 750.329) and of the Possession of a Firearm During the Commission of a Felony. The possible sentencing consequences for each type of manslaughter are identical.

STATEMENT OF PERTINENT FACTS

The Respondent will accept those facts presented by Petitioner as being basically correct. Petitioner does not however, present other material and relevant facts adduced during the course of his trial. The Respondent will now do so.

A friend of the deceased, Ernest Segura, who had been with him on the night of the fatal shooting testified that he and the deceased had been drinking that evening, that they had had a "few beers". They visited several bars and consumed alcohol at each of them. They ended up at the bar owned by the Petitioner here. Segura further testified that when they got to petitioner's bar, they left their vehicle and locked the keys inside it. Segura went to the door of petitioner's bar and knocked repeatedly asking for a coat hanger. The bar was closed at this

time. A voice inside the bar told him to go home. Shortly after that, the petitioner exited the bar. Segura again asked for a coat hanger, petitioner said that he was closed. At that point, petitioner told someone inside the bar to bring him his gun. Segura and the deceased went to their car. The petitioner exited the bar a second time and someone inside the bar handed him a gun. The petitioner then came fully out of the bar yelling, "I told you guys to go home". Segura again asked for a coat hanger at which time the petitioner "poked" the deceased in the chest with the firearm. The deceased fell against the car, stated that he didn't know why the petitioner was acting in the manner he was. At that point, the gun discharged. Segura testified that the petitioner raised the weapon chest high and fired it. The petitioner then carried the weapon back into the bar.

The medical/examiner testified that the deceased died from a gunshot wound to the neck.

A bar patron testified that he was inside the bar when "somebody kept beating on the door". The petitioner went to the door, engaged in a conversation with whomever was there, and then asked for his weapon. The petitioner left the bar, a shot was heard, and the petitioner reentered the bar, gave the weapon to this witness and told him to put it back. The petitioner then took the gun again and he and his wife left the bar through the back door. The petitioner then returned to the bar and told the witness to "don't say nothing, don't do nothing, keep my mouth shut, walk away".

Several other patrons testified in a similar manner. A barmaid testified that after the shot was fired the petitioner came back into the bar and said that nothing was wrong, "I just shot up in the air". This witness testified that the petitioner later told her that the shooting had been accidental because the shotgun had hit the wall; the petitioner then told her it had been accidental because the shotgun had dropped and hit the

ground. One police officer testified that when he responded to the scene, police had to use a special tool to enter the deceased's vehicle because the keys were inside it. A second officer testified that the petitioner told him that he, the petitioner, had thrown the weapon into the Detroit River. Police divers recovered the weapon from the river.

REASONS FOR DENYING THE WRIT

I

The petitioner first asserts that he is entitled to relief because he has been improperly convicted of involuntary manslaughter and possession of a firearm during the commission or attempt to commit a felony as prescribed by controlling Michigan law. (MCLA 750.329; MCLA 750.227b) Petitioner bases his argument on the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Petitioner's argument simply stated is this: although a conviction for voluntary or involuntary manslaughter under MCLA 750.321 returned in conjunction with a conviction for possession of a firearm during the commission or attempt to commit a felony under MCLA 750.227b would not violate any double jeopardy right, a conviction of involuntary manslaughter under MCLA 750.329 coupled with a conviction of "felony firearm" would violate double jeopardy precepts. His argument is based on the wording of the involved state statutes.

MCLA 750.321 is the general Michigan manslaughter statute. It provides in relevant part that;

> Any person who shall commit the crime of manslaughter shall be guilty of a felony. . .

Manslaughter under this statute is not further defined. It is a common law offense and its elements are defined by case law

precedents within the State of Michigan. Case law has developed in the State of Michigan that "manslaughter" is of two separate and distinct types, "voluntary" and "involuntary". *People v Townes*, 391 Mich 578 (1974). The punishment for either offense is identical. There also exist however, several additional offenses involving the unexcused death of a human being that are also classified as "manslaughter", albeit, of a special type. One of these "special types" is involved in this instant case.

The present petitioner was convicted of involuntary manslaughter under MCLA 750.329 which provides in relevant part that;

> Any person who shall wound, maim, or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.

The "felony firearm" statute provides in relevant part that;

> A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony. . . is guilty of a felony.

Numerous State appellate challenges have been brought on double jeopardy grounds in an attempt to obtain a finding that the felony firearm statute violates double jeopardy provisions. The Michigan Supreme Court has rejected those challenges. *Wayne County Prosecutor v Recorder's Court Judge*, 406 Mich 374 (1979); Reh. Den., 406 Mich 1127 (1979). In this last cited case, a petition for certiorari was denied by this Honorable Court, *Brintley, et al v Michigan*, 444 US 937, 100 S. Ct. 417, 62 LEd2d 317 (1979). The petition for certiorari was dismissed for want of a substantial federal question.

A related question recently arose in *Missouri v Hunter*, ____ US ____, 103 S. Ct. 673, 74 LEd2d 535 (1983). In that case a

state defendant had been tried and convicted of "first degree armed robbery" and "armed criminal action" based on the commission of the armed robbery. The appellate assesstion was a violation of the double jeopardy clause. The Supreme Court found no such violation.

After an analysis of the applicable state statutes and prior decisions by the Supreme Court (specifically, *Whalen v United States*, 445 US 684, 100 S. Ct. 1432, 63 LEd2d 715 (1980); *Blockberger v United States*, 284 US 299, 52 S. Ct. 80, 76 LEd 306 (1932); and *Albernaz v United States*, 450 US 333, 101 S. Ct. 1137, 67 LEd2d 275 (1981)), the Court decided that (citing Albernaz, supra);

> Where Congress intended, as it did here, to impose multiple punishments, imposition of such punishments does not violate the Constitution. (543)

This Court went on to note that;

> ... simply because two criminal statutes may be construed to proscribe the same conduct under the Blockberger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes.
>
> • • •
>
> Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockberger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. (544)

This Honorable Court earlier in the same opinion noted that, "We are bound to accept the Missouri Court's construction of that States statutes." (543)

In the present case, the Michigan Supreme Court has decided that felony firearm — associated felony convictions do not violate double jeopardy constraints. The Michigan Supreme Court has found the felony firearm statute to be constitutional. These rulings, in conjunction with the dismissal of the *Brintley* case, *supra*, and the decision rendered in *Hunter*, *supra*, effectively eviscerate petitioner's present argument.

What this petitioner seeks to do is to have this Honorable Court redetermine the intent of not only the Michigan Legislature in enacting the felony firearm statute (whose intent is clear on the face of the statute itself) but also of the Michigan Supreme Court as well by "reading in" to their statutory and case law decisions an intent that they did not express — notwithstanding that they were facially clear as to what their intent was. That result does not conform to present precedent as is noted above. See also *People v Elowe*, 85 Mich App 744 (1978); *People v Mahone*, 97 Mich App 192 (1980), Lv. Den., 411 Mich 922 (1980).

II

As his second argument, petitioner asserts that certain alleged prosecutorial misconduct at the first trial was intentional and that the granting of a new trial motion after conviction on that ground is the functional equivalent of the declaration of a mistrial. Inasmuch as that mistrial was declared out of a necessity to do so because of the intentional prosecution misconduct, so the argument flows, it is not a voluntary mistrial but one which should have precluded any retrial whatsoever.

Petitioner's argument runs afoul of the specific facts of this instant case.

During defense examination of the officer in charge of the case at the first trial defense counsel asked if the officer had written in *his* report that *another* officer at the scene used a special tool to open the deceased's vehicle to obtain his keys. The officer responded that he had written that in his report. He was, however, unable to find it when he reviewed his report.

During closing argument, defense counsel stressed this inability and attempted to portray the officer's testimony as having been given in bad faith and that all police reports were inaccurate and incomplete in this case; the officer making up the facts on the stand. The prosecutor responded in rebuttal argument by producing the report in which the above statement appeared and indicated to the jury that such statement did in fact exist. This report had never been placed into evidence.

During the discussion between both counsel and the court, it was determined that after the officer had left the stand he found the report with the special information in it and indicated to defense counsel its existence and the existence of the statement. The officer did not inform the prosecutor at that time.

Then, after both sides rested, defense counsel made his closing argument as indicated above. The prosecutor had in the meantime been apprised of the report and its contents and responded in his *rebuttal* closing argument as indicated above. Had the prosecutor wanted to deliberately interject impermissible matters and prejudice the jury why did he not so comment in his initial closing statement?

Upon a defense request for a mistrial, the court viewed the matters above and decided (correctly) that the defense argument had been misleading and the prosecutor's response was understandable, even if erroneous, under the circumstances. The motion for a mistrial was denied.

The record is thus clear; error by *both* the prosecution and defense required a new trial. This simple fact cannot mandate that defendant now goes free. If it did, then every time defense counsel goaded or baited the trial prosecutor into an intemperate remark possibly or potentially requiring reversal, justice would be totally subverted and the defendant would obtain a completely unjustified benefit. The law cannot be so blind as to allow or sanction such an outcome. If such a result obtains here, it will not be long before astute defense counsel begin to use this new-found "appellate parachute" to great effect. This result *cannot* find support. *People v Brocato*, 17 Mich App 277 (1969); *People v Milton*, 81 Mich App 515, 520 (1978).

What the trial court did, was direct that petitioner be given a new trial. This is in full accord with controlling Michigan case law.

In *People v Partee*, 410 Mich 871 (1980), the trial prosecutor had cross examined defendant about his financial status and the source of his income (which is clearly improper under Michigan case law) *and* argued to the jury facts not in evidence. That case represents a much more extreme case of "misconduct" than the present one where *both* defense and prosecution erred. The Supreme Court granted Partee a new trial *only*.

At the hearing of the Motion to Dismiss, the trial court heard oral argument, read briefs submitted by both counsel and denied defendant's motion. That court found:

(1) The new trial had been granted *not* because of prosecution error but because of the court's own misperception at trial of the nature of the curative instruction required.

(2) The court viewed the gravamen of the trial problem as one relating to the accusation of dishonesty on defense counsel's part.

(3) The prosecutor's error was not central to the case, was a peripheral issue at best. A cautionary instruction would have sufficed to cure whatever error there was.

(4) The problem arose due to its having been initiated by defense counsel, i.e., by the manner of his closing argument as it related to the nature and quality of police testimony. The issue was one of mere corroboration of eyewitness testimony.

(5) The prosecution error was harmless error on the specific facts of this case.

(6) Defendant's defense was a transparent assertion of self-defense and was an extremely difficult theory to accept on the specific facts of this case.

(7) The error was not central to a determination of guilt or innocence, and was of no real significance to the determination of guilt or innocence but, since it was an error and could have been cured by a cautionary instruction but was not, the court would give the benefit of the doubt to the defendant and grant a new trial.

The trial court was correct in these perceptions and findings. The record below establishes that there is no double jeopardy claim here with any merit — but merely an attempt to evade criminal responsibility.

III

As his third argument, petitioner asserts that the trial court in effect "changed horses in mid-stream" by first instructing the jury that accident was a defense to the charged manslaughter and then, on re-instruction them that it was not.

Petitioner again misreads the record below. The respondent will reproduce limited sections of the colloquy relating to

the instructions only to show the correct framework in which the instructions were given and to establish that there was no error present.

Defense counsel made it clear that defendant's only defense was accident. (V: 603). After some discussion as to how "accident" should be defined, counsel stated:

> MR. ZIEMBA: Accident is an inadvertent happening unmotivated by any bad intent by the actor and not attributable to acts which could have been foreseen and should have been foreseen by the actor as probably leading to some injury to some person, you see.
>
> • • •
>
> THE COURT: Wait a minute. Let me stop you there. If that is what you mean by accident, then I agree one hundred percent, that accident — sure, it's a defense.
>
> • • •
>
> THE COURT: And I will use that definition.
>
> • • •
>
> THE COURT: It certainly is with this definition of accident.
>
> My concern was that the term accident is often, and I suggest it is often used by laymen, to include the concept of negligence.
>
> But this definition, since it does not include that concept, in fact, tends to negate negligence, certainly would be a defense.
>
> Let me point out that it is a defense only in the sense that it negates one or more of the necessary elements of the offense.

MR. ZIEMBA: Now, will the Judge — will the Court instruct the jury that accident is a defense to voluntary manslaughter and involuntary manslaughter?

THE COURT: It would be a defense to all of these.

MR. ZIEMBA: Yes.

THE COURT: Certainly.

The "ground rules", based on a definition supplied by defense counsel, were thus set.

At the end of initial closing argument, defense counsel had objections to what the prosecutor said relating to accident.

MR. ZIEMBA: What is the Court going to instruct the jury? That accident is a defense. I thought we had that all hammered out.

• • •

THE COURT: . . . I am going to read the instructions as they are in 16-147.

Accident is not a defense to the extent that this crime requires that defendant intentionally point or aim the firearm at the deceased.

MR. ZIEMBA: Then your Honor has changed his mind?

THE COURT: I haven't changed my mind. About what?

MR. ZIEMBA: I thought we had agreed that accident is, according to that definition which I gave to the Court, that accident was a defense to all three of the charges upon which the court will instruct the jury. I thought we had that all agreed upon.

THE COURT: Well, only to the extent that the absence of accident is required by this definition.

What he was telling the jury is that as long as he intentionally points the firearm at the deceased, it doesn't matter if it goes off by accident. There is still involuntary manslaughter.

Do you disagree with that?

MR. ZIEMBA: Absolutely I do. There's . . .

The court's instructions to the jury read as follows (in relevant part):

It is the defense asserted, claimed by the defendant in this case, as regards all of the crimes charged, is what we sometimes call the defense of accident. That term as I'm using it has a fairly precise meaning.

It means an inadvertent happening occurring without any wrongful or bad intent and not attributable to acts which could have been foreseen by the actor as causing injury to anyone.

We say that this is a defense in this case. It is really kind of the negative of certain things that are claimed by the People.

In other words, the People claim in various — according to the various crimes, that there was a certain intent involved, as I indicated to you, or that there was certain negligence involved.

This defense is a way of saying that neither of those are true. (V: 745-745).

This instruction was given in addition to, and subsequent to, the court's instructions relating to the elements of voluntary and involuntary manslaughter and to the People's burden of proof.

Third, that the defendant caused the death without lawful justification or excuse.

• • •

Third, that the defendant caused the death without lawful justification or excuse.

Defense counsel objected stating,

MR. ZIEMBA: But the important point is that your Honor never told the jury in so many words that accident is a perfect defense to all of the charges which the Court defined to the jury.

Your Honor never said to the jury, members of the jury, if you find established that the shotgun was accidentally discharged and the cause of death of the deceased, then you should find the defendant not guilty.

Your Honor should have gone on further to say, members of the jury, if you find that the prosecution has not proven beyond a reasonable doubt that the shotgun was not accidentally fired, if you have a doubt on that point, any reasonable doubt, then you must find the defendant not guilty also.

I am at a loss to explain to myself why the Court did not make that statement to the jury. This is the very heart of the crux of the defendant's defense. And I think that the jury should be clearly instructed in unequivocal language that accident is a perfect defense.

The trial court in response stated:

It is probably incorrect, however, to say that so-called accident would be a perfect defense to all of these crimes if by that it is mean in the claim of involuntary manslaughter, for example, that — if the defendant intentionally pointed or aimed a firearm at the deceased and it

was discharged by — the discharge was by accident and that all the other elements of the offense are there, that homicide is excused.

I believe that this is a statutory crime which specifically (sic) — apparently specifically contemplates that when a person points a firearm at a deceased and death results from the discharge of a firearm so intentionally pointed at the deceased, that the crime of involuntary manslaughter is committed.

So in that sense the charge would not be correct as requested by the defendant. It would be correct if, of course, the defendant pointed the firearm or aimed it at the deceased accidentally, to use that term, since the offense requires the intentional pointing of a firearm at the deceased.

The next issue raised was with regard to the Court's instruction on accident.

That the Court did not tell the jury that if the gun discharged accidentally, the defendant would not be guilty.

Well, as I have just said that is not literally true.

Under involuntary manslaughter, the accidental discharge of the weapon would constitute involuntary manslaughter provided that all the other elements of the offense are present.

The court, after having heard objections to the original charge, gave a limited set of supplemental instructions to the jury.

Then, one other item, in defining the crimes of voluntary and involuntary manslaughter just in case this — well, in the definition of both of those crimes — I stated in the case of voluntary manslaughter that the third element was that the defendant caused the death without justification or excuse, and involuntary manslaughter, one of the

elements similarly was that the defendant caused the death without lawful justification or excuse.

The excuse that is relevant, that the People must negate in this case is the excuse of accident, which I discussed with you in my instructions. And you will recall I did tell you that the mere fact that the defendant was raising accident as an excuse did not mean that the defendant had the burden of proving that something occurred by accident, but rather it was the obligation of the People to prove that the death was not caused by accident.

The prosecutor then objected stating that,

MR. PETRELLA: Your Honor, I highly object to the way the Court instructed on the accident and I think my objection could be founded just by the question that was asked by juror number ten in terms of the confusion that the jury sees relative to accident.

Now, the Court said that accident would be a defense to voluntary and involuntary manslaughter. Accident being defined as what?

Now, I would respectfully ask the Court just to clear up the problem so that the jury understands accident in this way.

Ladies and gentlemen, if you find the defendant accidentally pointed the gun and it went off, that would be legal justification or excuse as defined as one of the elements that the prosecution has to prove.

Further, if you find that the defendant intentionally pointed a gun at the deceased and then the gun accidentally discharged, this would not be legal justification or excuse, if you find that the defendant intentionally pointed the gun at the deceased.

This jury is thoroughly confused given the fact of the way you defined accident.

The court continued, after further discussion:

We are back to the accident question then. And all I can say is everything I read about the statute makes it seem — makes it plain to me anyway that it makes manslaughter out of an accidental discharge of a firearm which results in death so long as the pointing of the weapon was done intentionally.

MR. ZIEMBA: Then we should instruct according to the Prosecutor's suggestion, that if it's an accidental aiming it's not manslaughter.

THE COURT: Oh, certainly, absolutely.

MR. ZIEMBA: But the. . . .

THE COURT: That would also be consistent with the defendant's theory of the case.

MR. PETRELLA: Absolutely.

MR. ZIEMBA: You see, I don't think that the Legislature really meant to punish a person who lawfully, that is, lawfully points a gun at somebody, albeit intentional, and then has the weapon accidentally discharge.

* * *

THE COURT: I'm going to read them again. And when I get to the part about justification or excuse, I'm going to explain that excuse means accident. That the accident refers to the pointing of the weapon and not the fact of the discharge.

MR. PETRELLA: Very good, your Honor, that I think would cover counsel's point and mine.

MR. ZIEMBA: I agree that far. May the record reflect that I object to the Court's not instructing that an accidental discharge is. . . .

THE COURT: Certainly.

Upon re-instructing the jury, the court stated:

Third, that the defendant caused the death without lawful justification or excuse.

In the terms of this case the one that is applicable is excuse. The excuse that is applicable that the People must negate is the excuse of accident.

Now, this means accident with regard to the pointing of the weapon. It doesn't mean accident — that they've got to disprove accident in the discharge of the firearm.

What all this indicates is that the court *did* instruct on accident as a defense to the charged offenses, and even utilized the definition supplied by defense counsel. Petitioner's assertions on appeal that the court instructed the jury that accident was not a defense, are simply incorrect.

CONCLUSION AND RELIEF

It is respectfully submitted that the initial basis of jurisdiction of this Honorable Court does not exist as pointed out earlier. The respondent also asserts that even if the "merits" of the petitioners claims are addressed, there simply is no basis upon which relief may be granted to the petitioner. The Petitioner is for the most part challenging state law concepts and procedures which do not present a substantial federal question.

Wherefore, the respondent respectfully requests that this Honorable Court deny any and all requested relief of the Petitioner.

Respectfully submitted,

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